Submission from Kenneth McCracken for the Legal Profession and Legal Aid (Scotland) Bill

I wish to make representations on certain aspects of the Bill which cause me concern.

I have held a Practising Certificate as a solicitor since 1987 during which time I have delivered service to clients and had experience of managing their expectations on many types of remits and transactions.

If the end result of a revised complaints procedure is risk management to a degree that manifests itself in refusal by solicitors to take on certain kinds of work, or letters of engagement from solicitors with more disclaimers on what the solicitor will not do than explanation of what he will actually do, that will be a poor result for the public. The LPLA Bill as drafted makes both points more likely than at the moment.

The current process for a client with a complaint is:-

1. Intimating the complaint to the firm to be dealt with in accordance with the firm’s complaints procedure.
2. In the event of ongoing dissatisfaction, intimating the complaint to the Law Society.
3. In appropriate cases, appointment by the Law Society of a Reporter to investigate the complaint.
4. In the event of dissatisfaction on handling of the complaint by the Law Society, complaining to the Scottish Legal Services Ombudsman about that handling as a result of which matters can be referred back to the Law Society to reopen the complaint.
5. Loss through professional negligence can be pursued through the civil courts (assisted, I would have thought, if there has been an adverse decision from the Law Society on the service supplied).

The last point, namely the opportunity to raise an action of professional negligence, has not received proper emphasis in the analysis of the existing complaints process. The increase in compensation for inadequate professional service to £20,000 is evidence of that point. Court action for negligence exists as a remedy against all service providers. The existing complaints procedure against lawyers is an additional remedy.

The LPLA Bill replaces, for service complaints, the second stage of the above process (complaint to the Law Society) with the right to complain to the Scottish Legal Complaints Commission (SLCC). My concerns about the proposed SLCC procedure are:-

1. Every complaint registered by the SLCC requires the firm against whom the complaint is made to pay a fee (apparently £300 is the suggested fee) which is non returnable even if the complaint is unfounded (even vexatious). The person making the complaint pays nothing. This is “consumer friendly” but unfair to solicitors without the counter balance I mention at point 3.
2. There is no need for an aggrieved client to exhaust internal complaints procedures before submitting a complaint to the SLCC.
3. The “no cost to the client” procedure makes it unfairly attractive for a client to raise all issues through the SLCC rather than internal complaints procedures or court action for professional negligence.
4. A more balanced approach would be for the firm to have the right to collect the £300 fee from the complainer in the event that:-

(a) internal complaints procedures have not been properly pursued; and/or

(b) their complaint is unsuccessful.

5. The SLCC seems to be a body financed by a levy on solicitors, controlled by others and accountable only to the Scottish Executive but not to solicitors. This seems inherently unfair. In addition, solicitors will have no control at all on the costs of the body they are being asked to finance.

6. The point raised in the Opinion of Lord Lester of Herne Hill, QC obtained by the Law Society that the SLCC does not comply with the European Convention of Human Rights if there is no right of appeal to a Tribunal or Court is important.

7. Some complaints “fall asleep” if the complainer does not supply information to the Law Society within a reasonable timetable of being requested to do so. Removal of the Ombudsman from the process will inevitably mean that the SLCC ends up having to favour the complainer in such situations at the expense of what the solicitor or firm may consider to be fair.

8. Raising the compensation for inadequate professional service from £5,000 (a level which was raised from £1,000 in 2005) to £20,000 unfairly removes court adjudication on professional negligence from the rights of a solicitor/firm. It is reasonable to assume that, if the amount of a claim is likely to be less than £20,000 the client will complain to SLCC rather than raise professional negligence proceedings. The proposed SLCC process allows the clients (entirely free of cost or risk) to have the claim investigated and considered. Again this is unfair to the solicitor.

My comments focus on those points where the balance is currently unfair to solicitors. I would hope that the Justice 2 Committee will be able to establish a better balance in its final proposal for the SLCC than currently exists in the LPLA Bill as drafted.